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IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be implied against a private corporation acting under color of federal law.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, the Petitioner states that it formerly was known as Esmor Correctional Services, Inc. The other parties in the proceedings below were Jorge Urena[1] and "'John Does #2 to John Does #10,' Inclusive, The Names Of Said John Doe Defendants Are Presently Unknown But Intended To Indicate Managers And Guards Of The Corporate Defendant."

Pursuant to Supreme Court Rule 29.6, Petitioner states that there are no parent companies, subsidiaries and/or affiliates of Correctional Services Corp. that have issued shares to the public.

[1] In the plaintiff's amended complaint, Jorge Urena was substituted as "John Doe Defendant #1." Although the caption to the district court's Memorandum Opinion and Order of July 28, 1999 (Pet. App. 19a) bears this substitution, the caption in the court of appeals opinion (Pet. App. 1a) does not.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Correctional Services Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was entered on October 6, 2000, is reported at 229 F.3d 374 (2d Cir. 2000), and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a-18a. The memorandum opinion and order of the United States District Court for the Southern District of New York was entered on July 28, 1999, is unreported, and is reprinted in Pet. App. at 19a-24a.

JURISDICTION

The court of appeals entered its decision on October 6, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

No constitutional or statutory provisions are involved in this petition. Instead, this case involves the permissibility of extending the constitutionally-inferred cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to the circumstances of this case.

STATEMENT OF THE CASE

The important question raised by the decision below is whether this Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), precludes the extension of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to create an implied cause of action for damages against a private corporation engaging in federal action by operating a correctional institution on behalf of the Federal Bureau of Prisons. This case implicates a clear and acknowledged split among the courts of appeals on the far-reaching fundamental question of whether private corporations acting under color of federal law are subject to *Bivens* claims.

A. This Court's Leading Cases: *Bivens* And *Meyer*

The interpretation of two critical decisions by this Court animates the correct analysis of the question posed in this case: *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *FDIC* v. *Meyer*, 510 U.S. 471 (1994). In *Bivens*, in the absence of any statutory basis for suit, this Court inferred a cause of action for private damages against Federal Bureau of Narcotics officers directly from the constitutional provision that they were alleged to have violated under color of federal law. In so doing, however, this Court cautioned that "[t]he present case involves no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396.

More recently, this Court unanimously refused to extend *Bivens* to imply a similar cause of action directly against an agency of the federal government, as opposed to against federal officers themselves. See *Meyer*, 510 U.S. at 473. The Court recalled that it has "'responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.'" *Id.* at 484 (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)). By seeking "to expand the category of defendants against whom *Bivens*-type actions may be brought to include not only federal *agents*, but federal *agencies* as well," the plaintiff in *Meyer* was seeking "a significant extension of *Bivens*," that was properly viewed with skepticism. *Id.*

In *Meyer*, this Court unanimously rejected the contention that the "'logic'" of *Bivens* would support implying "a *Bivens*-type cause of action directly against a federal agency." *Id.* To the contrary, given that the plaintiff in *Bivens* sued the federal *agents* of the Federal Bureau of Narcotics who allegedly violated his rights, "the logic of *Bivens* supports—a *Bivens* claim for damages against . . . the [agency] employee" wrongdoer, not against the agency itself. *Id.* at 485. Significantly, the *Meyer* Court was not persuaded that the logic of *Bivens* permits an entity, as opposed to an individual, to be subject to a *Bivens* suit even when that entity lacks sovereign immunity. See *id.* at 483 (holding that the FSLIC is not subject to a *Bivens* action even though its "sue-and-be-sued clause waives the agency's sovereign immunity for [plaintiff's] constitutional tort claim"); *id.* at 485 ("In essence, [plaintiff] asks us to imply a damages action based on a decision [*Bivens*] that presumed the *absence* of that very action.") (citing *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment)).

The *Meyer* decision suggested two other reasons not to extend *Bivens* to actions against federal agencies. First, implying a direct damages cause of action would undermine the deterrence rationale underlying *Bivens*: "[T]he purpose of *Bivens* is to deter *the officer*." *Id.* "If we were to imply a

damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. . . . [and] the deterrent effects of the *Bivens* remedy would be lost." *Id.* Second, one of the "'special factors counseling hesitation'" specifically enumerated in *Bivens*, namely, "creating a potentially enormous financial burden for the Federal Government," would be implicated by extending a *Bivens* cause of action against federal agencies. *Id.* at 486 (quoting *Bivens*, 403 U.S. at 396). Accordingly, the *Meyer* opinion rejected expansion of this judge-made cause of action and instead left "it to Congress to weigh the implications of such a significant expansion of Government liability." *Id.*

This case now raises the question of whether the logic of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, as refocused in *FDIC* v. *Meyer*, supports extending *Bivens* to create a cause of action against a private corporation acting under color of federal law.

B. Factual Background

Petitioner Correctional Services Corp. ("CSC"), a private corporation, operates the Le Marquis Community Corrections Center ("Le Marquis"), a halfway house located in New York, on behalf of the Bureau of Prisons ("BOP"). While in the custody and care of the BOP, John E. Malesko, the plaintiff in the underlying lawsuit here, was transferred to Le Marquis, where the events underlying this litigation transpired. At Le Marquis, Malesko was assigned to a fifth floor bedroom. CSC has a policy prohibiting inmates assigned to lower floors from using the elevator, but because Malesko had been diagnosed with a heart condition, CSC permitted Malesko to use the elevator. On or about March 28, 1994, however, Jorge Urena, a CSC employee, allegedly refused to permit Malesko to use the elevator and forced him to use the stairs. Upon ascending the stairs, Malesko allegedly suffered a heart attack, fell, and injured his ear.

Malesko also alleges that, during this time, CSC employees failed to replenish medication prescribed to treat his heart condition. See Pet. App. 2a-3a, 19a-20a.

As a result of the foregoing events, on March 27, 1997, Malesko filed a *pro se* complaint in the United States District Court for the Southern District of New York against CSC and certain "John Doe" CSC employees seeking $4,000,000 in damages. On February 2, 1999, Malesko filed an amended complaint substituting Jorge Urena for "John Doe Defendant #1." CSC moved to dismiss on February 10, 1999.

The district court treated Malesko's amended complaint as raising a *Bivens* claim. On July 28, 1999, the district court granted CSC's motion to dismiss the amended complaint as to CSC "on two independent grounds: first, that Plaintiff cannot bring a *Bivens* action against a corporation; and, second, that CSC is immune to suit because it is a government contractor." Pet. App. 20a. Citing *Meyer*, 510 U.S. at 483-87, the district court reasoned that "[a] *Bivens* action may only be maintained against an individual," Pet. App. 20a, and thus, was not available against CSC, a corporation.[1]

C. Decision Of The Court Of Appeals

The United States Court of Appeals for the Second Circuit reversed the district court's dismissal of the *Bivens* claim against CSC. The court of appeals concluded that the district

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[1] On March 17, 1999, Malesko cross-moved seeking to file a second amended complaint to name additional CSC employees as "Doe" defendants. Pet. App. 20a. The district court denied this motion as time-barred and thus, futile under Rule 15 of the Federal Rules of Civil Procedure. *Id.* at 21a-24a. The district court also made a similar ruling with respect to Urena, the remaining individual defendant. *Id.* at 24a. The Second Circuit affirmed these rulings. *Id.* at 18a. As a result, CSC is the only defendant remaining in the case. Accordingly, this case does not present the question of whether private individuals are liable under *Bivens*, even though they are employed by a private firm.

court erred in interpreting *Meyer* to preclude *Bivens* actions against private corporations.

The Second Circuit began by observing that "[a]lthough the issue is new in this Circuit, several circuit courts recognized prior to the *Meyer* decision that *Bivens*-type claims could be asserted against private corporations so long as the corporations engaged in 'federal action,' *i.e.*, they acted under color of federal law" and that "[d]uring this pre-*Meyer* time period, no circuit court ever held that private entities were not subject to *Bivens*." Pet. App. 5a-6a (citations omitted). Accordingly, the court reasoned that it was "not persuaded that the Supreme Court implicitly overruled this long line of cases in the *Meyer* opinion without making reference to any of them" and found, therefore, that "*Meyer* does not control our analysis of whether *Bivens* claims may be brought against private corporations." *Id.* at 12a.

The Second Circuit next observed that "[a]lthough *Meyer* addressed only whether *Bivens* claims could be brought against federal agencies and thus, on its face, did not appear to implicate the question of whether a private corporation could be sued under *Bivens*, other circuits have subsequently reached differing conclusions regarding its impact on such claims." Pet. App. 7a. Specifically, the court of appeals acknowledged that the D.C. Circuit and the Sixth Circuit have reached opposite results. Compare *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1224 (D.C. Cir. 1994), with *Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701 (6th Cir. 1998). In particular, the D.C. Circuit held, in light of *Meyer*, that a private entity that is "not a federal agency, but that is constrained by the Constitution in some or all of its acts solely because of *lesser* links to the federal government, is equally exempt from *Bivens* liability." *Kauffman*, 28 F.3d at 1224. In stark contrast, the Sixth Circuit held that "[n]othing in *Meyer* prohibits a *Bivens* claim against a private corporation that engages in federal action." *Hammons*, 156 F.3d at 705. After reviewing the circuit split, the panel followed the

Sixth Circuit's approach. See Pet. App. 10a ("We find the Sixth Circuit's analysis in *Hammons* persuasive and, substantially for the reasons articulated by that court, we hold that a private corporation acting under color of federal law may be sued under *Bivens*").

Like the Sixth Circuit, the Second Circuit held that *Meyer* was not dispositive "because private entities acting on behalf of the federal government are not the equivalent of federal agencies." Pet. App. 10a (suggesting private corporation was "akin to an agent of the government and not a federal agency").

The panel also found that the reasons presented in *Meyer* for not extending *Bivens* to claims against federal agencies were "not compelling" in the context of extending *Bivens* claims to private corporations. Pet. App. 10a. First, the Second Circuit looked beyond *Meyer*'s emphasis on deterrence, stating "we find an extension of such liability to be warranted even absent a substantial deterrent effect in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations." *Id.* (citing *Bivens*, 403 U.S. at 407-08 (Harlan, J., concurring)). To the extent deterrence was important, the court of appeals posited that it would not be undermined by extending liability to private entities because "an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees." *Id.* at 11a. Second, the Second Circuit reasoned that "although a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government, we do not believe such liability has the type of direct impact on federal fiscal policy" that raised concern in *Meyer* about extending *Bivens* claims to federal agencies. *Id.*[2]

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[2] Looking to what it termed the "analogous" 42 U.S.C. § 1983 context, the panel was "influenced strongly" by this Court's holding "that private corporations engaging in state action may be sued under § 1983. . . . We see no reason not to incorporate that law into the *Bivens* context and

REASONS FOR GRANTING THE PETITION

This case presents an important, recurring, and intolerable conflict of federal law regarding whether this Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to create an implied cause of action for damages against private corporations acting under color of federal law. Since this Court's decision in *Meyer*, at least three courts of appeals have issued conflicting decisions on this question of far-reaching doctrinal and practical importance. Compare *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1224, 1226-1228 (D.C. Cir. 1994), with Pet. App. 5a-12a, and *Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 704-08 (6th Cir. 1998). See also *Heinrich ex rel. Heinrich* v. *Sweet*, 62 F. Supp. 2d 282, 307-08 (D. Mass. 1999) (following *Hammons*). A clear and irreconcilable conflict thus currently exists among the courts of appeals and further review by this Court plainly is warranted to provide uniformity on a fundamental issue involving the scope of *Bivens*. Finally, the Second Circuit was wrong to permit a plaintiff to sue a private corporation for damages under *Bivens* and certiorari should be granted to correct this error.

I. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ABOUT WHETHER EXTENDING *BIVENS* TO CREATE A CAUSE OF ACTION AGAINST PRIVATE CORPORATIONS OPERATING UNDER COLOR OF FEDERAL LAW IS WARRANTED AFTER *MEYER*.

On the issue of whether *Bivens* actions should be extended to claims against private entities in light of this Court's ruling

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permit suits against private corporations engaging in federal action." Pet. App. 12a (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)). The Second Circuit therefore held that "a private corporation acting under color of federal law may be subject to liability under *Bivens*." *Id.*

in *Meyer*, the Second Circuit chose to follow the Sixth Circuit in *Hammons*. The court of appeals therefore held that a private corporation acting under color of federal law may be subject to liability under *Bivens* despite this Court's decision in *Meyer* precluding a *Bivens* action against a federal agency that had waived sovereign immunity. As acknowledged by the court of appeals below, its decision is squarely in opposition to the D.C. Circuit's holding in *Kauffman* that *Meyer* forecloses a *Bivens* action against a private entity. In these cases, the courts of appeals have sharply disagreed about the applicability of each aspect of the *Meyer* analysis to private entities operating under color of federal law.

Most fundamentally, the courts of appeals have disagreed about whether *Meyer*—a case in which the Court unanimously refused to extend *Bivens* to create a cause of action against a federal agency whose sovereign immunity had been waived—even controls the question of whether *Bivens* may be expanded to create a cause of action against a private entity acting under color of federal law. The D.C. Circuit held that *Meyer* "is controll[ing]" and barred a *Bivens* action against a private entity.[3] *Kauffman*, 28 F.3d at 1224. In contrast, the Second Circuit held that "*Meyer* does not control

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[3] The entity involved was the Anglo-American School of Sofia, chartered as "'a private and independent organisation [sic]'" and allegedly set up at the initiative of and funded in part by State Department, but not as a subsidiary of government. *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1224 (D.C. Cir. 1994). The Second Circuit asserted that the *Kauffman* decision resulted, in part, "from the fact that the entity at issue was arguably a federal government agency." Pet. App. 11a n.3. While the *Kauffman* decision does not warrant the Second Circuit's gloss, in case there is any question as to its intentions, the D.C. Circuit has further applied *Kauffman* to dismiss a *Bivens* claim against a private entity, the American Correctional Association ("ACA"), that has even fewer ties to government. *See Bailey* v. *Illinois Freedom Militia S. Zone*, No. 98-5094, 1998 WL 545425, at *1 (D.C. Cir. July 17, 1998) (noting also, as a second ground for dismissal, "[m]oreover, because ACA is not a federal actor . . . appellant's *Bivens* action cannot stand").

our analysis of whether *Bivens* claims may be brought against private corporations" and would permit a *Bivens* claim against Petitioner, a private corporation. Pet. App. 12a. Likewise, the Sixth Circuit held that "*Meyer* is not dispositive" as to whether a private corporation is amenable to a *Bivens* suit. *Hammons*, 156 F.3d at 705 (assuming that defendant engaged in sufficient state action, "[n]othing in *Meyer* prohibits a *Bivens* claim against a private corporation that engages in federal action"); see also *Heinrich*, 62 F. Supp. 2d at 308 (holding that "the Supreme Court's reasoning in *Meyer* is inapplicable to the case of private entity defendants").

More particularly, the courts of appeals have disagreed sharply about whether the specific rationales articulated in *Meyer* to preclude *Bivens* liability against a federal agency that lacked sovereign immunity applies to private corporations acting under color of federal law. *First*, this Court's unanimous decision in *Meyer* emphasized that "the purpose of *Bivens* is to deter *the officer*" from engaging in unconstitutional conduct. *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). Accordingly, even where sovereign immunity is waived, and thus does not bar suit against the wrongdoing federal agent's employer, "[i]f we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity [of federal officers], there would be no reason for aggrieved parties to bring damages actions against individual officers. . . . [and] the deterrent effects of the *Bivens* remedy would be lost." *Id.*; see *Kauffman*, 28 F.3d at 1227 ("*Meyer* argued that if given a choice, plaintiffs would have every reason to sue a federal agency instead of its individual officials, because this tactic would circumvent the qualified-immunity defenses that the individuals might be expected to raise."). There is sharp disagreement among the courts of appeals about whether *Bivens* even warrants the *Meyer* Court's unanimous emphasis on deterring individual officers from engaging in unconstitutional conduct[4] and about how properly to analogize deterrence concerns in the context of a private entity *Bivens* defendant.

The Sixth Circuit read the deterrence rationale of *Meyer* narrowly and analogized private entities to federal officers, rather than analogizing private entities to public entities: "the concern the Court had regarding qualified immunity and its effect on deterring individual officers is not a concern in the context of private corporations inasmuch as private corporations are not public officials[] and thus, not entitled to qualified immunity." *Hammons*, 156 F.3d at 706 n.9. The D.C. Circuit, by contrast, read the deterrence concerns articulated in *Meyer* more broadly and found them applicable even where the entity is a private, and not a federal, entity. In particular, the D.C. Circuit explained that "the premise of *Meyer* is that individual agents are not deterred by the threat of suit against their employers. . . . [Accordingly,] there would seem to be no affirmative reason to allow *Bivens* actions against entities of any sort, private or public." *Kauffman*, 28 F.3d at 1227. The court further reasoned that,

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[4] Despite acknowledging *Meyer*'s emphasis on deterrence, both the Second and Sixth Circuits suggest that the true purpose of *Bivens* is not deterring unconstitutional conduct, but remedying unconstitutional conduct irrespective of deterrence. Pet. App. 10a ("[W]e find an extension of such liability to be warranted even absent a substantial deterrent effect in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations.") (citing *Bivens*, 403 U.S. at 407-08 (Harlan, J., concurring)); *Hammons*, 156 F.3d at 705, 706 & n.10 ("While the Court in *Meyer* focussed on the deterrence goal, this clearly is not the only goal underlying a *Bivens* claim"; suggesting that *Bivens* really "seemed to focus . . . on the history of the federal courts and their role protecting rights under the Constitution"; citing to Justice Harlan's concurrence in *Bivens* to assert that "while recognizing the importance of deterring the individual wrongdoer, [we] believe that the importance of remedying constitutional violations far exceeds any deterrence goal—victims are entitled to relief regardless of whether future lawless conduct is deterred"; "[a]lthough deterrence is an important policy consideration, victims of lawless conduct should be remedied regardless of whether future constitutional violations are deterred.").

"on *Meyer*'s logic, provision of a damages remedy against a private entity would actively diminish the deterrent value of the remedy against the individual." *Id.* "If such additional defendants were available (often with deeper pockets than the individual offenders), plaintiffs might make the same choice as [plaintiffs here], who brought their *Bivens* action *only* against the private entity and not against the individual [wrongdoers]." *Id.* Linking this argument to the overall deterrence concern described in *Meyer*, the D.C. Circuit concluded that "[t]o the extent that plaintiffs make such choices with any regularity, *Meyer* indicates that the deterrent effect of the *Bivens* remedy would be weakened." *Id.* (noting "[i]n sum, on *Meyer*'s deterrence rationale, there is no affirmative reason to recognize *Bivens* actions against private entities, and there is some reason *not* to do so"). The Second Circuit, by contrast, posited that *Meyer*'s concern about deterring the individual wrongdoer would not be undermined by extending liability to private entities because "an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees." Pet. App. 11a. Accordingly, there is a sharp dispute about the proper interpretation and application of the deterrence rationale of *Bivens* and *Meyer* in the private entity context.

Second, there also is clear disagreement about whether one of the "'special factors counseling hesitation'"—namely, "creating a potentially enormous financial burden for the Federal Government"—specifically enumerated in *Bivens*, and applied in *Meyer*, is implicated by extending a *Bivens* cause of action against private corporations. *Meyer*, 510 U.S. at 486 (quoting *Bivens*, 403 U.S. at 396). Based in part on this concern, the *Meyer* Court rejected expansion of *Bivens* against federal agencies and left "it to Congress to weigh the implications of such a significant expansion of Government liability." *Id.*

The D.C. Circuit found this argument relevant to the private corporation case because "diversion of resources from a

private entity created to advance federal interests has effects similar to those of diversion of resources directly from the Treasury." *Kauffman*, 28 F.3d at 1227-28. It further reasoned that if funds were diverted from the private entity's coffers to liability payments, "the government presumably w[ould] have to choose between allowing its interest to be served less well and spending more money to make up the shortfall—precisely the same choice that it would confront if *Bivens* actions could be brought against federal agencies." *Id.* at 1227. By contrast, the Sixth Circuit concluded that *Meyer*'s concern about the "potentially enormous financial burden on the Government" in extending *Bivens* liability to federal agencies "is not applicable to the case at hand" because "[a]llowing a *Bivens* claim against a private corporation does not implicate 'federal fiscal policy,' where, as here, the federal purse is not involved." *Hammons*, 156 F.3d at 706. Similarly, the Second Circuit observed that:

> although a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government, we do not believe such liability has the type of direct impact on federal fiscal policy that the Supreme Court in *Meyer* was concerned would result from imposing *Bivens* liability directly upon federal agencies.

Pet. App. 11a.

But, as the D.C. Circuit recognized, there is more at stake than just direct impacts on the federal fisc. Even beyond *Meyer*'s discussion of Congress's institutional superiority to create remedies implicating federal fiscal policy, the D.C. Circuit noted that "[m]ore generally, *Meyer* expressed considerable reluctance to extend *Bivens* remedies beyond the sort of situation involved in *Bivens* itself." *Kauffman*, 28 F.3d at 1228 (recalling *Meyer*'s emphasis on exercising caution in expanding *Bivens* remedies to new contexts). Accordingly, despite some pre-*Meyer* decisions that seemed to assume the availability of *Bivens* actions against private corporations,

"we think the present case presents such a 'new context[].'" *Id.* (omission in original) (quoting *Meyer*, 510 U.S. at 484).[5]

Accordingly, there is a well-developed, clear, and irreconcilable conflict among the courts of appeals about whether, in light of *Meyer*, a *Bivens* action may be created against private corporations acting under color of federal law.

II. THE QUESTION OF WHETHER *BIVENS* APPLIES TO PRIVATE CORPORATIONS ACTING UNDER COLOR OF FEDERAL LAW IS RECURRING AND IMPORTANT.

The conflict created by the courts of appeals presents an important issue that recurs in a variety of contexts. For example, in the cases which form and discuss the circuit split at issue, private entities have been sued under color of federal law in the context of corrections (*Malesko*), education (*Kauffman*, *Heinrich*), railroads (*Hammons*), and hospitals (*Heinrich*). Thus, the current circuit split has far-reaching implications for whether private entities acting under color of federal law are amenable to suit under *Bivens*.

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[5] There also is a clear division of opinion about the impact of those pre-*Meyer* court of appeals decisions that seemed to assume the availability of a *Bivens* cause of action against a private corporation. The Second Circuit observed that "[d]uring this pre-*Meyer* time period, no circuit court ever held that private entities were not subject to *Bivens*" and was "not persuaded that the Supreme Court implicitly overruled this long line of cases in the *Meyer* opinion without making reference to any of them." Pet. App. 6a, 12a (citing and purporting to follow pre-*Meyer* cases); *see also Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 708 (6th Cir. 1998) (citing and "join[ing]" pre-*Meyer* cases); *Heinrich ex rel. Heinrich* v. *Sweet*, 62 F. Supp. 2d 282, 308 (D. Mass. 1999) (following *Hammons* and pre-*Meyer* circuit precedent "that appears to allow the use of *Bivens* against private entities"). By contrast, the D.C. Circuit held that the pre-*Meyer* cases assuming *Bivens* causes of action against private corporations "do[] not survive *Meyer*." *Kauffman*, 28 F.3d at 1226, 1228 & n.3 (citing cases).

In particular, in the corrections area alone, there has been a marked increase in the privatization of federal correctional institutions in recent years. In the last ten years, the number of prisoners being housed in private facilities nationwide has jumped from 15,476 to 141,361. See Charles W. Thomas, *Private Adult Correctional Facility Census*, Figure 1, *at* http://www.crim.ufl.edu/pcp/census/2000 (Oct. 13, 2000). In 1997, the BOP reported that 10 percent (9,951 of 98,631) of its total population of sentenced prisoners were held in privately-operated facilities. See Douglas McDonald et al., Abt Assoc. Inc., *Private Prisons in the United States: An Assessment of Current Practice* 12 (1998). Moreover, Congress recently "mandated that 50 percent of the District of Columbia inmates . . . be placed in private facilities by 2003." Kathleen Hawk Sawyer, *Message to All Bureau of Prisons Employees Regarding Privatization*, *at* http://www.bop.gov/ccdpg/ccdpriv.html (July 1999). The impact of this question extends even beyond the BOP, given that the U.S. Marshals Service and the U.S. Immigration and Naturalization Service also have contracted with private correctional facilities. Accordingly, whether a federal prisoner may bring a *Bivens* action against a private corporation acting under color of federal law has important and far-reaching implications.

Moreover, the current split of authority among the federal courts of appeals as to whether *Bivens* implies a cause of action against private corporations acting under color of federal law leads to several anomalous results in the corrections arena alone. For example, whether a federal prisoner housed in a private correctional facility is permitted to bring a *Bivens* action against that entity currently depends on the happenstance of geography. In the Second and Sixth Circuits (as well as in the District of Massachusetts)—under *Malesko* and under the logic of *Hammons* and *Heinrich*—a federal prisoner may bring a *Bivens* cause of action against a private correctional entity acting under color of federal law. By contrast, in the D.C. Circuit, under the logic of *Kauffman*,

they may not. This problem is exacerbated by the fact that the BOP exercises plenary authority over prison transfers. Accordingly, prisoners may find their *Bivens* rights radically transformed as they are transferred between facilities located in federal jurisdictions with different controlling precedent.

Furthermore, whether a federal prisoner in the Second and Sixth Circuits (or in the District of Massachusetts) may bring a *Bivens* action against the correctional entity to which that prisoner is assigned, depends upon the happenstance of that entity being a public or private facility. Within these federal jurisdictions (at least), the BOP (or another analogous federal agency) and the public prisons it runs would not be subject to *Bivens* actions while private correctional facilities in those same jurisdictions would be subject to *Bivens* actions. Compare, *e.g.*, Pet. App. 12a (permitting a *Bivens* action against Petitioner CSC, a private corporation operating a correctional facility in New York on behalf of the BOP, despite *Meyer*), with *Tejeda* v. *Reno*, No. 00-CIV-6338 SAS, 2000 WL 1280969, at *3 (S.D.N.Y. Sept. 11, 2000) (following *Meyer* and prohibiting a *Bivens* action against the BOP and a federal penitentiary), and *Newman* v. *Holder*, 101 F. Supp. 2d 103, 107 (E.D.N.Y. 2000) (holding that the BOP "as an agency of the United States, is not a proper defendant in a *Bivens*-type action"). This Court should grant certiorari to correct these anomalous results and to answer once and for all whether private entities acting under color of federal law are subject to *Bivens* actions.

III. THE SECOND CIRCUIT ERRED IN EXTENDING *BIVENS* TO CREATE A PRIVATE CAUSE OF ACTION AGAINST A PRIVATE CORPORATION OPERATING UNDER COLOR OF FEDERAL LAW.

In *Meyer*, this Court unanimously rejected the contention that the "'logic'" of *Bivens* would support implying "a *Bivens*-type cause of action directly against a federal agency," even when that agency enjoyed no sovereign immunity from

suit. *Meyer*, 510 U.S. at 484. To the contrary, given that the plaintiff in *Bivens* sued the federal *agents* of the Federal Bureau of Narcotics who allegedly violated his rights, "the logic of *Bivens* supports—a *Bivens* claim for damages against . . . the [agency] employee" wrongdoer, not against the agency itself. *Id.* at 485. Likewise here, the district court below was correct in holding that a *Bivens* action only may be maintained against an individual and thus, was not available against CSC, a corporation.

In summarizing its argument, the D.C. Circuit in *Kauffman* usefully recalls that the very foundation of a *Bivens* claim presupposes that the defendant is acting sufficiently *like* government to be considered acting under color of federal law. See *Kauffman*, 28 F.3d at 1226 (observing that plaintiffs "enjoy a constitutional claim only to the extent that the [private actor's decision] can be analogized to the decision of a federal agency"). Accordingly, the panel concluded, "[w]e think it untenable to draw this analogy for purposes of *Bivens* but not for purposes of *Meyer*." *Id.* If a federal agency that has waived sovereign immunity is not subject to suit under *Bivens*, then neither is a private corporation acting like a federal agency. The proper *Bivens* defendant is an individual wrongdoer, not an entity, be it public or private.

For all of the reasons outlined above, this Court should grant the petition to correct the Second Circuit's error in extending *Bivens* liability to private corporations, to answer this important and recurring question of federal law, and to end the irreconcilable conflict among the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 22, 2000

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.

No. 99-7995.

JOHN E. MALESKO,
Plaintiff-Appellant,

v.

CORRECTIONAL SERVICES CORPORATION, formerly known as ESMOR CORRECTIONAL SERVICES INC. AND "JOHN DOES # 1 TO JOHN DOES # 10," inclusive, the names of said John Doe Defendants are presently unknown but intended to indicate officers and managers and guards of the corporate defendant,
Defendants-Appellees.

Argued: April 19, 2000
Decided: Oct. 06, 2000

Before: POOLER and SOTOMAYOR, Circuit Judges.*

Affirmed in part; vacated and remanded in part.

SOTOMAYOR, Circuit Judge:

Plaintiff-appellant John E. Malesko appeals from the July 28, 1999 judgment of the United States District Court for the

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* The Honorable Ellsworth A. Van Graafeiland was originally assigned as a member of the panel but, due to illness, did not attend oral argument or participate in the disposition of this appeal. The appeal is being determined by the remaining members of the panel, who are in agreement. *See* 2d Cir. R. § 0.14(b); *Murray v. National Broad. Co.*, 35 F.3d 45, 46 (2d Cir.1994).

Southern District of New York (Martin, Judge) dismissing his complaint against defendant-appellee Correctional Services Corporation ("CSC") and a specifically named CSC employee, and denying him leave to file a second amended complaint. For the reasons that follow, we vacate the district court's dismissal of the claims against CSC. We affirm, however, the district court's dismissal of Malesko's claim against the individual CSC employee as time-barred and the denial of leave to file the second amended complaint on the same ground.

BACKGROUND

On December 3, 1992, following his conviction for federal securities fraud, Malesko was sentenced to eighteen months imprisonment under the supervision of the Federal Bureau of Prisons ("BOP"). While in the custody and care of BOP, Malesko was diagnosed with a heart condition, which was treated with prescription medication. On February 2, 1994, Malesko was transferred to Le Marquis Community Corrections Center, a halfway house where he was to serve out the balance of his sentence. The halfway house is operated on behalf of BOP by CSC, a private corporation.

Malesko was assigned to living quarters on the fifth floor of the halfway house and was permitted to use the elevator to travel from the lobby to his room. On or about March 1, 1994, however, CSC allegedly instituted a policy requiring inmates residing below the sixth floor to use only the staircase to travel from the first-floor lobby to their rooms. Despite CSC's policy, Malesko claims that he was permitted to use the elevator because CSC staff knew of his medical condition. According to Malesko, however, on March 28, 1994, a CSC employee prevented him from using the elevator to go from the lobby to his room on the fifth floor. The employee instead directed Malesko to climb the staircase, even though Malesko reminded the employee of his heart

condition. While climbing the stairs, Malesko suffered a heart attack, fell, and injured himself. Malesko also claims that approximately ten days prior to this incident, he had run out of the medication prescribed for his heart condition, and that CSC had failed to replenish his medication as of that date.

On March 27, 1997, Malesko filed a pro se action against CSC in the United States District Court for the Southern District of New York, claiming violations of his rights in connection with the foregoing. Malesko did not name any specific individuals as defendants; instead, he named ten "unknown" "DOE" defendants. Malesko's complaint bore the following caption:

> JOHN E. MALESKO, Plaintiff against CORRECTIONAL SERVICES CORPORATION FORMERLY KNOW [sic] AS ESMOR CORRECTIONAL SERVICES INC., "JOHN DOE # 1 TO JOHN DOE # 10" INCLUSIVE, THE NAMES OF SAID JOHN DOE DEFENDANTS ARE PRESENTLY UNKNOWN BUT INTENDED TO INDICATE OFFICERS AND MANAGERS AND GUARDS OF THE CORPORATE DEFENDANT

On February 2, 1999, Malesko, by counsel, filed an Amended Complaint, which was identical to the initial complaint in all material respects except that it substituted Jorge Urena as "JOHN DOE DEFENDANT # 1" and alleged that Urena was the CSC employee who prevented Malesko's use of the elevator on March 28, 1994 and directed Malesko to climb the stairs.[1] On February 10, 1999, CSC moved to dismiss the Amended Complaint. On February 17, 1999, Malesko cross-moved seeking to file a second amended complaint to name as "DOE" defendants additional CSC employees allegedly responsible for Malesko's injuries.

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[1] Defendants-Appellees do not dispute that the CSC employee in question was Jorge Urena.

On July 28, 1999, the district court entered a judgment granting CSC's motion to dismiss the Amended Complaint, denying Malesko's motion to file a second amended complaint, dismissing the Amended Complaint as against Urena and instructing the Clerk of Court to close the case. *See Malesko v. Corrections Servs. Corp.*, No. 97 Civ. 4080(JSM), 1999 WL 549003 (S.D.N.Y. July 28, 1999). The district court treated Malesko's Amended Complaint as raising claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), which provides for a cause of action for damages against federal agents who violate constitutional rights.

The district court dismissed the Amended Complaint as to CSC on two grounds. First, it held that Malesko could not bring a *Bivens* claim against a corporation such as CSC because, according to the district court, "[a] *Bivens* action may only be maintained against an individual." *Id.* at *1. Second, the district court held that, even if Malesko could assert a *Bivens* claim against a private corporation, CSC was nevertheless "shielded from liability" because CSC had "contracted with the federal government to carry out a project on behalf of the government." *Id.*

The district court also denied Malesko's motion to file a second amended complaint naming additional specific CSC employees as defendants. The district court found that because the statute of limitations had run on Malesko's *Bivens* claims as of March 28, 1997 (one day after he filed his initial complaint), Malesko's subsequent assertion of such claims against additional defendants was time-barred and therefore a "futile amendment" under Fed R. Civ. P. 15. *See id.* at *2. The district court rejected Malesko's contention that his substitution of specifically named defendants for the "DOE" defendants should "relate back" to the filing date of his initial complaint. *See id.* at *2-*3.

The district court dismissed the Amended Complaint as to Urena on similar grounds, finding that the Amended Complaint substituting Urena as a defendant had been filed nearly two years after the statute of limitations had run. *See id.* at *3. This appeal followed.

DISCUSSION

I. Claims Against CSC

Because the district court dismissed Malesko's claims against CSC on the pleadings, we review that decision *de novo*, accepting as true all material factual allegations in the complaint. *See Jones v. New York Div. of Military and Naval Affairs*, 166 F.3d 45, 48 (2d Cir.1999).

A. *Bivens* Claims and Private Corporations

We note initially that the question of whether a *Bivens* claim may lie against a private corporation is an issue of first impression in this Circuit. The district court dismissed Malesko's *Bivens* claim against CSC because it concluded that a *Bivens* claim may only be asserted against an individual federal agent, not against private corporations such as CSC. The district court reached this result through a purported application of the Supreme Court's decision in *FDIC v. Meyer*, 510 U.S. 471, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994), which held that *Bivens* claims may not be brought against agencies of the federal government. *See Malesko*, 1999 WL 549003 at *1 (citing *Meyer*, 510 U.S. at 483-87). The district court did not explain why *Meyer*'s holding regarding federal agencies precluded a *Bivens* claim against CSC, which is not a federal agency. Reviewing this question de novo, we now hold that a private corporation acting under color of federal law may be subject to a *Bivens* claim.

Although the issue is new in this Circuit, several circuit courts recognized prior to the *Meyer* decision that *Bivens*-

type claims could be asserted against private corporations so long as the corporations engaged in "federal action," *i.e.*, they acted under color of federal law. *See, e.g., Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir.1987) (holding that private corporation employed by Department of Navy to provide security services would be subject to *Bivens* claims if, on remand, its actions were found to constitute federal action); *Gerena v. Puerto Rico Legal Serv., Inc.*, 697 F.2d 447 (1st Cir.1983) (recognizing that private entities may be subject to *Bivens* claims, but dismissing claims at issue against legal assistance corporation because it did not engage in federal action); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir.1982) (permitting *Bivens* claim against private contractor that supplied personnel, materials, transportation and services to federal government); *Yiamouyiannis v. Chemical Abstracts Serv.*, 521 F.2d 1392 (6th Cir.1975) (per curiam) (remanding for factual determination of whether private corporation engaged in federal action for purposes of *Bivens*). During this pre-*Meyer* time period, no circuit court ever held that private entities were not subject to *Bivens* claims.

In 1994, the Supreme Court addressed in *Meyer* whether "to expand the category of defendants against whom *Bivens*-type actions may be brought to include not only federal agents, but federal agencies as well." 510 U.S. at 484. *Meyer* involved a *Bivens* claim against the Federal Savings and Loan Insurance Corporation based on an alleged violation of an individual's due process rights. *See id.* at 484-85. The Court, noting that no Court of Appeals decision other than the decision on appeal had ever implied a *Bivens* cause of action directly against a federal agency, declined to do so for several reasons. First, part of the rationale for creating the *Bivens* cause of action against federal officials had been to compensate for the fact that "a direct action against the government was not available." *Id.* at 485. Second, allowing

Bivens suits against agencies would contravene "the purpose of *Bivens* [which] is to deter the officer." *Id.* The Supreme Court explained that, because a plaintiff bringing a *Bivens* claim against an agency could thereby avoid facing the qualified immunity defense available to officers, "there would be no reason for aggrieved parties to bring damages actions against individual officers" and "the deterrent effects of the *Bivens* remedy would be lost." *Id.* Finally, the Court, observing that "a direct action for damages against federal agencies . . . would be creating a potentially enormous financial burden for the Federal Government," refused to expand the government's direct liability without congressional legislation to that effect. *Id.* at 486.

Although *Meyer* addressed only whether *Bivens* claims could be brought against federal agencies and thus, on its face, did not appear to implicate the question of whether a private corporation could be sued under *Bivens*, other circuits have subsequently reached differing conclusions regarding its impact on such claims. In the D.C. Circuit, the Court of Appeals has held that *Meyer* precludes *Bivens* suits against private entities acting under color of federal law, thereby overruling an earlier pre-*Meyer* D.C. Circuit decision allowing such claims. *See Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223 (D.C.Cir.1994), overruling *Reuber v. United States*, 750 F.2d 1039 (D.C.Cir.1985).[2] Declaring in *Kauffman* that its decision was "controlled by *FDIC v. Meyer*," the D.C. Circuit, over a vigorous dissent by then-Chief Judge Mikva, held that *Bivens* claims could not be asserted against the Anglo-American School of Sofia, a

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[2] In *Reuber*, the D.C. Circuit had held that *Bivens* encompassed actions against private parties acting under color of federal law, and had remanded the case for a determination of whether the defendant, an operator of a government-owned facility pursuant to a contract with the National Cancer Institute, had so acted. *Id.*

"private and independent organisation" established by the U.S. Department of State "to provide elementary-level instruction to the children of American and British diplomats stationed in Sofia, Bulgaria." 28 F.3d at 1224 (internal quotation marks omitted). The *Kauffman* majority reasoned that because a private entity must act under color of federal law in order to be subject to *Bivens*, such an entity is "equivalent" to a federal agency and, under *Meyer*, must be treated as "if [it] were really a federal agency." *Id.* at 1227.

The *Kauffman* majority, echoing *Meyer*'s rationale that the deterrence purpose of *Bivens* would be frustrated if claims could be asserted against federal agencies, found that employees of private entities would be undeterred from engaging in unconstitutional conduct if claims could be asserted against their employers. *See id.* at 1227. The court similarly adopted *Meyer*'s reasoning that *Bivens* claims against federal agencies would create a "potentially large financial drain on the government" and concluded that the "diversion of resources from a private entity created to advance federal interests has effects similar to those of diversion of resources directly from the [federal] Treasury" because such costs would be passed on to the government. *Id.* at 1227-28. The *Kauffman* majority thus held that *Meyer*'s reasoning precluded *Bivens* claims against private entities acting under color of federal law. *Id.* at 1228.

In contrast, the Sixth Circuit in *Hammons v. Norfolk Southern Corp.*, 156 F.3d 701 (6th Cir.1998), concluded that "[n]othing in *Meyer* prohibits a *Bivens* claim against a private corporation that engages in federal action," and held that such claims should be allowed. *Id.* at 705. The *Hammons* court observed that while *Meyer* had focused on *Bivens*'s deterrence rationale in concluding that claims should not be asserted against federal agencies, "the primary goal of *Bivens* was to provide a remedy for victims of constitutional violations by federal agents where no other remedy exists,

regardless of whether the official would be deterred in the future from engaging in such conduct." *Id.* at 706 (citing *Bivens*, 403 U.S. at 407-08 (Harlan, J., concurring)). The court therefore concluded that "the importance of remedying constitutional violations" favored the allowance of *Bivens* claims against private entities acting under color of federal law regardless of whether such allowance deterred future violations. *Id.* The *Hammons* court also found, in contrast to the D.C. Circuit, that *Meyer*'s concern about "the potentially enormous financial burden on the Government" was inapplicable with respect to private corporations because claims against private corporations do not directly impact the "federal purse" and thus "do[ ] not implicate federal fiscal policy." *Id.* (citations and internal quotation marks omitted).

Having determined that "*Meyer* [was] not dispositive" on the matter, *id.* at 706, the Sixth Circuit proceeded to address whether private corporations should be subject to *Bivens* claims. The court observed that *Bivens* claims against federal officers have consistently been treated in the same manner as claims against state officers under 42 U.S.C. § 1983 (1994). *See id.* at 707 ("[T]he standards of liability in *Bivens* actions are similar to the standards under § 1983. Both the Supreme Court and this Court have noted that actions brought under § 1983 raise identical concerns as those raised in *Bivens* actions." (citing *Butz v. Economou*, 438 U.S. 478, 500, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978))). The court further noted that "[i]t is undisputed that corporations engaging in state action can be sued under § 1983." *Id.* (citations omitted). Accordingly, the *Hammons* court held that corporations engaging in federal action should, by analogy, be subject to *Bivens* claims. *See id.* at 708. In so holding, the court observed that it joined the Courts of Appeals for the First, Fifth and Ninth Circuits in their conclusions (albeit pre-*Meyer*) that a *Bivens* claim may be brought against private corporations engaging in federal action. *See id.*

We find the Sixth Circuit's analysis in *Hammons* persuasive and, substantially for the reasons articulated by that court, we hold that a private corporation acting under color of federal law may be sued under *Bivens*. As an initial matter, we do not believe that *Meyer* is dispositive here because private entities acting on behalf of the federal government are not the equivalent of federal agencies. In *Cohen v. Empire Blue Cross*, 176 F.3d 35 (2d Cir.1999), we found that Empire Blue Cross, acting as a fiscal intermediary on behalf of the government to process Medicare claims, was akin to an agent of the government and not a federal agency. *See id.* at 42 ("[Defendant] is a private not-for-profit corporation established under the laws of the State of New York. It is not funded by the United States, and the United States has no proprietary interest in its operations. . . . [It] may act as an agent for the government, [but] it is not an institutional arm of the government such as a department, commission, board, or bureau."). We see no reason to treat differently other private corporations acting on behalf of the government.

Moreover, the reasons the Supreme Court articulated in *Meyer* for declining to extend liability to federal agencies are not compelling with respect to the question of whether private corporations should be subject to *Bivens* liability. Although deterring wrongdoing by individuals is an important goal of *Bivens* liability, we find an extension of such liability to be warranted even absent a substantial deterrent effect in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations. Justice Harlan, in his concurring opinion in *Bivens*, elaborated upon the relationship between these two goals:

> I agree with the Court that the appropriateness of according *Bivens* compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form

> of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law—vested with the power to accord a remedy—should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

Bivens, 403 U.S. at 407-08 (Harlan, J., concurring). In any event, we are not convinced that allowing *Bivens* claims against private corporations would undermine the deterrence purpose of *Bivens*. Even assuming a plaintiff would decline to sue the offending employee and sue only the employer, we believe that an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees. Furthermore, although a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government, we do not believe such liability has the type of direct impact on federal fiscal policy that the Supreme Court in *Meyer* was concerned would result from imposing *Bivens* liability directly upon federal agencies.[3]

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[3] In our view, the non-unanimous *Kauffman* decision finding such impact is incorrect, or, at best, resulted from the fact that the entity at issue was arguably a federal government agency. Although the *Kauffman* majority referred to the defendant school as a "private" entity, the school had been set up by the U.S. Department of State, part of its governing board was appointed by a U.S. ambassador, and it was directly funded, in part, by the U.S. government. *See Kauffman*, 28 F.3d at 1224.

Finally, as noted above, several Courts of Appeals before *Meyer*'s issuance recognized that private corporations may be subject to *Bivens* claims. We are not persuaded that the Supreme Court implicitly overruled this long line of cases in the *Meyer* opinion without making reference to any of them. We therefore find that *Meyer* does not control our analysis of whether *Bivens* claims may be brought against private corporations.

In deciding that *Bivens* liability should extend to private corporations, we are influenced strongly by the law governing § 1983 claims. We have consistently treated *Bivens* and § 1983 actions as analogous for most purposes, and we "have typically incorporated § 1983 law into *Bivens* actions." *Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir.1995) (per curiam) (citing *Carlson v. Green*, 446 U.S. 14, 18-20, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980)); *see also Ayeni v. Mottola*, 35 F.3d 680, 688 n. 10 (2d Cir.1994); *Ellis v. Blum*, 643 F.2d 68, 84 (2d Cir.1981). The Supreme Court has made it clear that private corporations engaging in state action may be sued under § 1983. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936-37, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). We see no reason not to incorporate that law into the *Bivens* context and permit suits against private corporations engaging in federal action. Moreover, we find that extending *Bivens* liability to reach private corporations furthers *Bivens*'s overriding purpose: providing redress for violations of constitutional rights. *See Bivens*, 403 U.S. at 407-08 (Harlan, J., concurring).

Accordingly, we join the Courts of Appeals for the First, Fifth, Sixth and Ninth Circuits and hold that a private corporation acting under color of federal law may be subject to liability under *Bivens*.

B. Government Contractor Defense

In addition to finding that a *Bivens* action could not be maintained against CSC, the district court held that CSC would have been immune from such a suit in any event by virtue of the immunity for government contractors set forth in *Boyle v. United Technologies, Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). *See Malesko*, 1999 WL 549003 at *1 (citing *Boyle*, 487 U.S. at 505-09; *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 19, 60 S.Ct. 413, 84 L.Ed. 554 (1940); *Norwood v. Esmor, Inc.*, No. 95 Civ. 8281(LAP), 1997 WL 65913 (S.D.N.Y. Feb.13, 1997)). We disagree and hold that on the record presented to the district court, CSC may not avail itself of the government contractor defense.

In *Boyle*, the Supreme Court articulated the standard for determining when federal law shields government contractors from state tort liability arising from design defects in military equipment. *See Boyle*, 487 U.S. at 512. The Supreme Court held:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Boyle, 487 U.S. at 512. The Supreme Court reasoned that "selection of the appropriate design for military equipment" involved "judgment as to the balancing of technical, military, and even social considerations" that should not be "second-guess[ed] . . . through state tort suits against contractors" carrying out the design specifications of the federal government. *Id.* at 511 (citations and internal quotation marks omitted). Thus, the Court concluded that "state law which holds Government contractors liable for design defects in

military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at 512.

Although the government contractor defense has primarily developed in the context of military contractors, the defense has been applied more broadly by some courts to protect contractors in non-military contexts. *See, e.g., Boruski v. United States*, 803 F.2d 1421, 1430 (7th Cir.1986) (defense applies in "civilian relationships" where "a contractor has acted in the sovereign's stead and can prove the elements of the defense") (citation and internal quotation marks omitted); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir.1985) ("Both the history of the defense and its general rationale lead us to the conclusion that it would be illogical to limit the availability of the defense solely to 'military' contractors"). This Circuit has never expressly addressed the issue.[4] However, this case does not present the appropriate forum in which to do so since, even assuming the potential applicability of the defense outside the military context, the requirements necessary for its application are not satisfied here.

The government contractor defense only shields a government contractor from claims arising out of its actions where the government has exercised its discretion and judgment in approving precise specifications to which the contractor must adhere. *See Lewis v. Babcock Indus., Inc.*,

[4] We also question, although need not decide, whether the government contractor defense may ever be invoked as a shield against *Bivens* claims. As the Court in *Boyle* explained, the government contractor defense exists to protect against situations where the "application of state law [claims] would frustrate specific objectives of federal legislation." *Id.* at 507 (internal quotation marks omitted) (emphasis added). The *Bivens* cause of action, however, was created to advance federal constitutional interests. Such claims are not state law claims but rather arise under the U.S. Constitution.

985 F.2d 83, 86-87 (2d Cir.1993) (holding that government contractor defense requires "that the design feature in question was considered by Government officers, and not merely by the contractor"). In other words, "[s]tripped to its essentials," the government contractor defense is "to claim, 'The Government made me do it.'" *In re Joint Eastern and Southern Dist. New York Asbestos Litg.*, 897 F.2d 626, 632 (2d Cir.1990). Here, Malesko alleges that various CSC policies or practices led to his injury—assigning him to a room on the fifth floor, forbidding him from using the elevator, and failing to refill his heart medication prescription—but neither he nor CSC claims that the government played any role in formulating or approving these policies or practices. Because no allegation exists in the record before the district court that the government played any role in these decisions, we conclude that the district court erred in holding that CSC was protected from liability by the government contractor defense. *See, e.g., In re Hawaii Asbestos Cases*, 960 F.2d 806, 813 (9th Cir.1992) (holding that suppliers of insulation products containing asbestos to the Navy could not invoke defense where suppliers "simply failed to allege, let alone establish, that . . . they were acting in compliance with 'reasonably precise specifications' imposed on them by the United States") (quoting *Boyle*, 487 U.S. at 512).

II. Claims Against Individual Defendants

The district court dismissed the *Bivens* claims against Jorge Urena on the ground that the claims were time-barred. *See Malesko*, 1999 WL 549003 at *3. For the same reason, the district court denied as "futile" Malesko's motion to file a second amended complaint substituting additional specific individuals for "DOE" defendants. *Id.* at *2-*3. We review *de novo* the district court's dismissal of the *Bivens* claims against Urena on the pleadings. *See Jones*, 166 F.3d at 49. We review the district court's denial of leave to amend the complaint for

abuse of discretion. *Id.* If that denial was based on a legal interpretation, however, we review the decision *de novo*. *Id.*

In New York, the statute of limitations for bringing a *Bivens* action is three years from the accrual of the claim. *See Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir.1987). The parties do not dispute that Malesko's claim accrued on March 28, 1994, the day on which he suffered his heart attack while climbing the CSC stairs. Thus, the statute of limitations on Malesko's *Bivens* claims expired on March 28, 1997, one day after he filed his original complaint.

Malesko, however, did not identify any of the alleged "DOE" defendants listed on his original complaint until February 2, 1999, when he submitted an Amended Complaint substituting Jorge Urena as "JOHN DOE DEFENDANT # 1." On February 17, 1999, Malesko moved for leave to file a second amended complaint that would purportedly have substituted additional CSC employees as "DOE" defendants. It is therefore clear from the record that the statute of limitations expired on Malesko's *Bivens* claims before he added or sought to add any individual defendants. Malesko attempts to avoid this conclusion by arguing that, pursuant to Fed.R.Civ.P. 15(c), the date of filing for his amendments identifying individual defendants may "relate back" to the timely date on which the original complaint was filed. *See Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1075 (2d Cir.1993) (stating that " 'John Doe' pleadings" can "be used to circumvent statutes of limitations" where "all the specifications of Fed.R.Civ.P. 15(c) are met").

Under Rule 15(c), when an attempt is made to bring in a new party, the date of the amendment adding that party will "relate back" to the date of the original complaint only when (1) the claim arises out of the same conduct originally pleaded and (2) within (ordinarily) 120 days of the original filing date,

> the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed.R.Civ.P. 15(c)(3) (emphasis added). Thus, in order to have the filing dates for the Amended Complaint and second amended complaint relate back to the date of the original Complaint, Malesko must show, *inter alia*, that he failed to name Urena and other specific CSC employees due to a "mistake concerning the identity of the proper party." Fed.R.Civ.P. 15(c)(3)(B). A plaintiff is not considered to have made such a "mistake," however, if the plaintiff knew that he was required to name an individual as a defendant but did not do so because he did not know the individual's identity. *See Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 470 (2d Cir.1996) ("Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities.").

Here, it is clear that Malesko believed that there existed individual defendants who were potentially liable for his injuries, but did not know their exact identities prior to the expiration of the statute of limitations. As revealed by the caption from his original complaint, Malesko "INTENDED TO INDICATE OFFICERS AND MANAGERS AND GUARDS OF THE CORPORATE DEFENDANT [CSC]," but he did not do so because "THE NAMES OF SAID JOHN DOE DEFENDANTS ARE PRESENTLY UNKNOWN." Under these circumstances, Malesko cannot avail himself of Rule 15(c) such that his untimely substitution of specifically named individuals for "DOE" defendants may "relate back" to the date he filed his original complaint. *See Tapia-Ortiz v.*

Doe, 171 F.3d 150, 151-52 (2d Cir.1999) (holding that plaintiff, who, in his original complaint, sued "Doe" defendant officers who allegedly applied excessive force, could not "relate back" his amendment naming specific officers two years after the statute of limitations had run); *Barrow*, 66 F.3d at 470 (holding that plaintiff named "John Does" because he did not know the arresting officers' names and that, "[s]ince the new names were [subsequently] added not to correct a mistake but to correct a lack of knowledge, the requirements of Rule 15(c) for relation back are not met").

We therefore affirm the district court's decision dismissing the Amended Complaint as to Urena and denying Malesko's motion to file the second amended complaint because these claims were barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of *Bivens* claims against defendant Urena and its denial of leave to file the second amended complaint, but vacate the district court's dismissal of claims against CSC and remand for further proceedings consistent with this opinion.[5]

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[5] In a discussion spanning less than one page of his appellate brief, Malesko argues for the first time that he is entitled to recover under the Americans With Disabilities Act, 42 U.S.C. § 12131, *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. Although CSC invites us to address the merits of these claims, we decline to do so. The district court may consider the arguments on remand after the issue has been adequately briefed. *See Able v. United States*, 88 F.3d 1280, 1292 (2d Cir.1996) (declining to address the merits of a claim where the issue was not considered in the district court and remanding for such consideration).

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 97 Civ. 4080(JSM).

JOHN E. MALESKO,

Plaintiff,

v.

CORRECTIONAL SERVICES CORPORATION, JORGE URENA and JOHN DOE # 2 to JOHN DOE # 10.

Defendants.

July 28, 1999.

MEMORANDUM OPINION AND ORDER

MARTIN, J.

This case is before the Court on Defendant Correctional Services Corporation's ("CSC") motion to dismiss per Rule 12(b)(6) and Plaintiff's motion to amend the Complaint per Rule 15.

FACTS

On December 3, 1992, Judge Freeh sentenced Plaintiff to eighteen month's imprisonment following his conviction for securities fraud. During his imprisonment, Bureau of Prisons medical personnel determined that Plaintiff suffered from congestive heart failure and prescribed drugs to treat this condition. On February 4, 1994, the BOP transferred Plaintiff, along with his medical records, to the Le Marquis halfway house at 15 East 31st Street in Manhattan. Defendant CSC operates the Le Marquis facility.

CSC assigned Plaintiff to a bedroom on the fifth floor of the Le Marquis facility. Despite a policy prohibiting inmates assigned to lower floors from using the elevator, CSC granted Plaintiff permission to use the elevator in light of his medical condition. On March 28, 1994, Plaintiff returned to Le Marquis from a weekend furlough and attempted to use the elevator to get to his room in time for a head count. Jorge Urena, a CSC employee, prohibited Plaintiff from using the elevator and forced him to use the stairs. While ascending the staircase Plaintiff experienced a heart attack, fell down and injured his left ear.

PROCEDURAL HISTORY

On March 27, 1997, Plaintiff filed a complaint with the Court's Pro Se office alleging constitutional torts and violation of Plaintiff's right to "equal access." On September 15, 1997, CSC filed a motion to dismiss the Complaint and the Court denied this motion on January 6, 1998. CSC answered the Complaint on April 16, 1998. Following oral argument on January 19, 1999, the Court granted Plaintiff, by then represented by counsel, permission to file an amended complaint. On February 2, 1999, Plaintiff did so and CSC moved to dismiss the Amended Complaint on February 10, 1999. Among other changes, the Amended Complaint names one of the ten John Doe defendants as Jorge Urena. On March 17, 1999, Plaintiff moved to file a second amended complaint.

I. Motion to Dismiss the Complaint

CSC moves to dismiss the Amended Complaint on two independent grounds: first, that Plaintiff cannot bring a *Bivens* action against a corporation; and, second, that CSC is immune to suit because it is a government contractor.

A *Bivens* action may only be maintained against an individual. *F.D.I.C. v. Meyer*, 510 U.S. 471, 483-487, 114

S.Ct. 996, 1004-1006 (1994). Subsequent cases cited by the Plaintiff do not undermine this holding. *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100 (1997) (Individual prison guards hired by private contractor liable under 42 U.S.C. § 1983).

Even if Plaintiff had a valid claim, Defendants would still prevail because they are immune from suit. A private party that has contracted with the federal government to carry out a project on behalf of the government is shielded from liability by the doctrine of sovereign immunity. *Boyle v. United Technologies*, 487 U.S. 500, 505-09, 108 S.Ct. 2510, 2515-17 (1988); *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 19, 60 S.Ct. 413, 414 (1940); *Norwoood v. Esmor*, 1997 WL 65913 (S.D.N.Y. Feb. 13, 1997). CSC has not waived its immunity to suit and thus cannot be sued.

For these reasons, the Amended Complaint is dismissed as to defendant CSC.

II. Motion to Amend the Complaint

> A party may amend its pleading:
> once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.

Fed.R.Civ.P. 15(a).

Other amendments are only permitted with leave of the Court. *Id.* While "leave shall be freely given when justice so requires," a court need not approve a futile amendment. *Jones v. New York State Div. of Military and Naval Affairs*, 166 F.3d 45, 49 (2d Cir.1999).

Because the statute of limitations on Plaintiff's claim ran on March 28, 1997, (one day after he filed the original Complaint) the addition of new defendants raises the question of whether the Amended Complaint of February 2, 1999 or the proposed second amended complaint relate back to the timely filed Complaint. *See Owens v. Okure*, 488 U.S. 235, 236, 109 S.Ct. 573, 574 (1989); *Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 35 (2d Cir.1996) (Statute of limitations on section 1983 claims is three years.)

Rule 15(c) allows an amendment to relate back to the date of the original pleading if:

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed R. Civ. P. 15(c).

A plaintiff's failure to name individual defendants when the plaintiff knows that such individuals must be named is not a mistake as contemplated by Rule 15(c). *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466, 470, *modified*, 74

F.3d 1366 (2d Cir.1996). Rule 15(c) does not permit a Section 1983 plaintiff to relate back an amendment that names parties who were unknown to the plaintiff at the filing of the original complaint. *Id.*

A plaintiff may relate back an amended complaint when the inadequacy of the original complaint evidences a legal or factual mistake, *e.g.*, misunderstanding the legal requirements of the cause of action or misapprehending the true identities of the people sought to be sued. *Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 36 (2d Cir.1996).

The original complaint in this action is styled "John Malesko v. Correctional Services Corporation . . . and John Doe # 1 to John Doe # 10 inclusive, the names of said John Doe defendants are presently unknown but intended to indicate officers and managers and guards of the corporate defendant." Based upon the caption of the Complaint, Plaintiff knew at the time of filing that he was required to name individual defendants. His failure to identify individual defendants within the limitations period leads to only two conclusions: that he knew the names of the individual defendants and declined to include them or that the identities of the John Does were unknown to him when he filed the Complaint. Neither of these reasons is a factual or legal mistake sufficient to trigger the relation back provision of Rule 15(c). *See Barrow*, 66 F.3d at 469; *Soto*, 80 F.3d at 36-37; *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir.1994); *Doyle v. Coombe*, 976 F.Supp. 183, 191-192 (W.D.N.Y.1997); *Thomas v. Arevalo*, 1998 WL 427623 (S.D.N.Y. July 28, 1998); *Green v. New York City Dept. of Corrections*, 1997 WL 96548 (S.D.N.Y. March 5, 1997); *Fitzgerald v. McKenna*, 1996 WL 715531 (S.D.N.Y. Dec. 11, 1996).

Amending the Complaint to add individual defendants would not relate back to the date of the original complaint, and any amendment would therefore be untimely. Because

granting leave to amend the Complaint would be futile, the application is denied.

For the same reason, the Court dismisses the individual claims against Jorge Urena. While the Court did grant Plaintiff leave to amend the Complaint, that leave did not extend to the addition of defendants as to whom the statute of limitations has run.

For the foregoing reasons the Amended Complaint is dismissed with prejudice and the motion to file a second amended complaint is denied. The Clerk of Court is instructed to close this case.

SO ORDERED.